STATE OF MICHIGAN

COURT OF APPEALS

MARK RAYMOND FAGERMAN, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED June 17, 2008
v	No. 275027 Wexford Circuit Court
ANITA LOUISE FAGERMAN, Defendant/Counter-Plaintiff-Appellant.	LC No. 04-018520-CH

Before: Bandstra, PJ, and Talbot and Schuette, JJ.

PER CURIAM.

In this action arising from an agreement that was determined to be a mortgage, defendant appeals as of right, challenging the trial court's decisions allowing plaintiff to redeem the property in question, awarding defendant interest as a deficiency judgment rather than part of the redemption price, and denying defendant's requests for additional costs and sanctions. We affirm.

Plaintiff and defendant are brother and sister. The parties agreed to an arrangement whereby defendant borrowed money against her credit cards to loan to plaintiff to enable him to improve real property in Wexford County. The parties' agreement required plaintiff to pay defendant interest based on the terms of defendant's credit card agreements. After plaintiff defaulted on his payments to defendant, a dispute arose concerning ownership of the property. Plaintiff thereafter filed this action to quiet title to the property and defendant filed a counterclaim seeking recovery of the balance of the amount owed or to foreclose on the property to satisfy the debt. In June 2005, the trial court determined that the parties' agreement constituted a mortgage and granted a judgment of sale to satisfy the debt owed, but also held that defendant was not entitled to recover any interest because the agreement provided for a usurious rate of interest.

Defendant appealed the trial court's judgment, challenging in part the trial court's determination that she was barred from recovering any interest. While the appeal was pending, defendant executed on the judgment and purchased the property at a sheriff's sale in September 2005, for $24,779.51. In February 2006, pursuant to a court order, plaintiff redeemed the property by paying $26,183.36 to the court clerk. Because the trial court had previously ruled

that defendant was not entitled to interest, the redemption price did not include any interest, but did encompass sheriff sale fees incurred and taxes paid.

Thereafter, in March 2006, this Court held that if the various interest rates that plaintiff agreed to pay pursuant to defendant's credit card agreements were combined the resulting blended rate did not appear to be usurious. *Fagerman v Fagerman*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2006 (Docket No. 264558) ("*Fagerman I*"), slip op at 3-4. This Court remanded the case for additional proceedings to calculate the interest rate by blending the various rates. *Id.*, slip op at 4.

On remand, the trial court determined, based on the parties' stipulation, that the applicable interest rate was 9.208 percent and that defendant was owed $6,385.96 in interest as of February 10, 2006, the date of redemption, plus per diem interest from that date of $1.6110. In September 2006, the trial court granted defendant a deficiency judgment for those amounts. The court also denied defendant's requests to set aside the prior order that allowed plaintiff to redeem the property, and to declare defendant the owner of the property. This appeal followed.

On appeal, defendant raises several issues regarding: (a) her entitlement to interest as part of the redemption price, (b) whether plaintiff properly redeemed the property where interest was not included in the redemption price, and (c) whether the trial court erred by awarding defendant the amount owed for interest in a deficiency judgment. We find no merit to defendant's arguments.

Contrary to what defendant argues, the trial court did not violate MCL 600.3155 by changing the "upset price" for the property after the sheriff's sale. At the time the sheriff's sale was conducted, the trial court's earlier ruling that defendant was not entitled to interest was still in effect. This Court later reversed that decision in *Fagerman I* and remanded the case for a determination of interest. The trial court never changed the sale price of the property, but only used that price to calculate the interest that was due defendant in accordance with this Court's prior decision. Defendant has not established an error on this basis.

Defendant also argues that the amount plaintiff paid to redeem the property was insufficient because it did not include interest. Although MCL 600.3140(1) authorizes the inclusion of interest in the redemption price, subsection (3) of that statute requires the purchaser to file an affidavit "that states the exact amount required to redeem the property." Defendant acknowledges that the affidavit she filed did not include any amount for interest. We reject defendant's argument that, before redeeming the property, plaintiff was required to contact her to determine the amount of interest that was due in order to redeem. At the time the property was redeemed, the trial court's order barring defendant from recovering any interest was still in effect. It was not until after plaintiff redeemed the property that this Court determined in *Fagerman I* that defendant might be entitled to interest. Because plaintiff was under no legal obligation to pay interest at the time of redemption, he was not required to contact defendant to determine what interest was due. Accordingly, plaintiff was permitted to redeem the property without paying interest.

Although we agree that the right of redemption is governed by statute and that a court may not ordinarily rely on equitable considerations to avoid the clear and plain meaning of a statute absent unusual circumstances such as fraud, accident, or mistake, *Senters v Ottawa*

Savings Bank, FSB, 443 Mich 45, 54-55; 503 NW2d 639 (1993), this case involved unusual circumstances, given that defendant had been judicially determined not to be entitled to interest at the time plaintiff redeemed the property. It was not until later, after the property had been redeemed, that this Court determined that interest could be awarded. Under these circumstances, we conclude that the trial court's decision to award defendant interest in a deficiency judgment did not offend MCL 600.3140 or MCL 600.3155.

Defendant also argues that, to the extent that equitable considerations did apply, they did not favor allowing plaintiff to redeem the property because he violated an injunction by taking out a mortgage to finance the redemption price and because it was his challenge to the interest rate as usurious that led to the problems associated with the interest issue. This argument has no merit. The injunction only prohibited plaintiff from doing anything to diminish the value of the property. It did not prohibit him from securing financing to pay the redemption price through a mortgage. Further, we cannot fault plaintiff for challenging the interest rate, considering the unusual nature of the parties' agreement and the differing interest rates that were applicable. Additionally, defendant contributed to the subsequent uncertainty regarding interest by simultaneously appealing and enforcing the original judgment.

We agree with defendant that the successor judge's reliance on res judicata and the law of the case doctrine as a basis for not disturbing the original judge's rulings allowing plaintiff to redeem the property was misplaced. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999); *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 37-38; 536 NW2d 815 (1995). Nonetheless, defendant has not shown that the original judge's rulings allowing plaintiff to redeem the property were improper.

Defendant also argues that the trial court erred by referring to the election of remedies rule when refusing to set aside plaintiff's redemption. We disagree. The rule is procedural in nature and prevents one to whom inconsistent remedies are available from pursuing both. The purpose behind the rule is to prevent one from obtaining a double recovery for a single injury. *Riverview Co-op, Inc v First Nat'l Bank & Trust Co of Michigan*, 417 Mich 307, 311-312; 337 NW2d 225 (1983). The rule requires "(1) [t]he existence of two or more remedies; (2) the inconsistency between such remedies; and (3) a choice of one of them." *Id*. at 313. The trial court applied the rule to defendant's decision to proceed with the sheriff's sale pursuant to an order that barred her from recovering interest while at the same time pursuing an appeal of the interest issue. Defendant should have realized that, by electing to proceed with the sheriff's sale before the merits of her appeal were determined, she had no legal basis for requesting interest as part of any redemption price. Conversely, if defendant wanted plaintiff's redemption price to include interest, she should have delayed executing on the original judgment until the interest issue was decided on appeal. Because the trial court limited its application of the election of remedies rule to defendant's request to set aside the redemption, we find no error.

Defendant also argues that the trial court misapplied the maxim "equity abhors a forfeiture," because this case involved a foreclosure. Viewed in context, the trial court was merely explaining that equitable considerations, many of which have been incorporated into statutory law, did not allow it to simply grant defendant the property. The court's comments provide no basis for reversal.

Defendant also offers a variety of other reasons for why she believes plaintiff did not properly redeem the property and why it should be awarded to her, none of which have merit.

First, plaintiff did not waive his right to redeem by failing to pay all expenses required by statute. Plaintiff paid the sale price plus additional amounts set forth in defendant's affidavit. Plaintiff was not required to include in the redemption price additional, unspecified amounts to which defendant might later become entitled if her appeal of the interest issue was successful.

Second, it was not improper for defendant to pay the redemption funds to the court clerk where he obtained the court's approval to do so. This method of payment was necessary in light of the pending litigation and defendant's reluctance to accept the redemption proceeds because of her apparent belief that it would compromise her legal position.

Third, there is no merit to defendant's argument that, in light of the pending appeal in this Court, the trial court lacked jurisdiction to order the court clerk to accept plaintiff's redemption payment. This Court previously issued an order in the prior appeal expressly providing that "trial court retains jurisdiction over such [postjudgment] matters." *Fagerman v Fagerman*, unpublished order of the Court of Appeals, entered October 12, 2005 (Docket No. 264588).

In addition, defendant's argument that she effectively redeemed the property in January 2006, thereby cutting off plaintiff's right to redeem, is legally flawed. Defendant's argument is based on a misinterpretation of MCL 600.3140(1), which provides that "[t]he mortgagor, the mortgagor's heirs, executors, or administrators, or any person lawfully claiming from or under the mortgagor or the mortgagor's heirs, executors, or administrators may redeem the entire premises . . . ." Defendant was the mortgagee, not the mortgagor, and therefore did not have a right to redeem under MCL 600.3140.

For these reasons, plaintiff properly was allowed to redeem the property for an amount that did not include interest, and the trial court properly awarded defendant the interest that she was later determined to be entitled to receive in a deficiency judgment.

Defendant also contends that the trial court erred by failing to award her "default costs," consisting of a percentage of the amount due calculated at a rate of 19.99 percent (based on the terms of defendant's credit card agreement) because of plaintiff's default. We disagree.

To the extent that defendant argues that she is entitled to recover these alleged "default costs" as interest at the higher 19.99 percent rate, such recovery is precluded by this Court's decision in *Fagerman I*, which is the law of the case. *Freeman, supra*. This Court previously determined that defendant was not entitled to recover interest beyond the legal limit of 11 percent set forth in MCL 438.31c(6), and remanded for a determination of the "blended" or combined interest rate owed by plaintiff under the parties' agreement. *Fagerman I, supra*, slip op at 3-4. Additionally, on remand, defendant stipulated that the blended interest rate was 9.208 percent. Thus, pursuant to this Court's decision in *Fagerman I* and defendant's stipulation on remand, defendant is precluded from recovering interest at a rate greater than 9.208 percent.

Furthermore, to the extent that defendant seeks entitlement to additional "default costs" as late or penalty fees, rather than interest, such recovery is also precluded. Although late fees charged by a lender are not considered interest, see *Eriksen v Fisher*, 166 Mich App 439, 447-

449; 421 NW2d 193 (1988); *Barbour v Handlos Real Estate & Bldg Corp,* 152 Mich App 174, 188; 393 NW2d 581 (1986), the "costs" defendant seeks to recover are based on the increased interest rate charged by her credit card companies and would simply be part of the interest she was seeking to recover from plaintiff. In addition, defendant previously obtained a judgment and never sought damages for late or penalty fees, as distinguished from interest. Although defendant successfully appealed the trial court's original denial of interest, the proceedings on remand were limited by the scope of this Court's remand order, i.e., a determination of interest. Defendant was precluded at that stage from advancing additional claims for damages that did not involve interest.

For these reasons, the trial court properly refused to award defendant the requested "default costs."

Finally, defendant argues that plaintiff 's positions were frivolous and without legal merit and, therefore, the trial court erred in denying her motion for sanctions under MCR 2.114 and MCL 600.2591.

MCR 2.114(D) imposes an affirmative duty on an attorney to conduct a reasonable inquiry into both the factual and legal viability of a pleading before it is signed. *LaRose Market, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). "The reasonableness of the inquiry is determined by an objective standard and depends on the particular facts and circumstances of the case." *Id*. Additionally, sanctions may be awarded under MCL 600.2591 if a claim or defense is frivolous. A claim is frivolous if it was "made to harass, embarrass, or injure" an opposing party, or the plaintiff "had no reasonable basis to believe that the facts supporting his claim were false, or that his position was devoid of arguable legal merit." *Wallad v Access BIDCO, Inc,* 236 Mich App 303, 313-314; 600 NW2d 664 (1999).

A trial court's determination whether a party violated MCR 2.114(D), and whether a claim is frivolous, is reviewed for clear error. *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999); *Contel Systems Corp v Gores*, 183 Mich App 706, 710-711; 455 NW2d 398 (1990).

Defendant argues that sanctions should have been awarded because plaintiff's position that the parties' agreement did not constitute a mortgage, and that the agreement was usurious, were both devoid of arguable legal merit. We disagree.

The informal and unorthodox nature of the parties' agreement left its proper characterization in question. Indeed, defendant herself repeatedly advanced the position that the agreement was not a mortgage and, when this issue was decided against her, appealed that decision to this Court. In light of defendant's own position on that issue, plaintiff's similar attempts to litigate the nature of the agreement do not qualify as frivolous.

Similarly, although the usury issue was eventually decided against plaintiff, the credit card agreements that governed the parties' agreement relative to interest clearly contained interest rates above the prescribed legal limit, and defendant herself attempted to recover interest at a rate of up to 19.99 percent. Furthermore, defendant admitted that even her attorney failed to discover the decision in *Mills v Pesetsky*, 208 Mich App 190; 527 NW2d 545 (1994), aff'd in part and vacated in part 453 Mich 975 (1996), on which this Court relied in *Fagerman I* to

conclude that the parties' agreement may not be usurious if a "blended" approach was used to determine the interest rate. Even then, this Court determined that further proceedings were required on remand to determine whether the applicable interest rate was lawful under the blended approach. Under these circumstances, plaintiff's usury argument was not frivolous.

Accordingly, the trial court did not clearly err in denying defendant's request for sanctions.

Affirmed.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Bill Schuette